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EXCULPATORY DECLARATIONS.

I.

Declarations by the Defendant.

In *Davis* v. *State,* recently decided by the Supreme Court of Alabama,[1] the defendant had been convicted of homicide which occurred in a store. Evidence had been offered that after having had a difficulty with the deceased at the mill where they worked the defendant returned home and informed his wife that he was going to the store to settle his account. The majority of the court hold that this evidence should have been admitted to explain the defendant's presence at the store and to rebut any presumption of intent and premeditation. The only opinion written, cogently expresses a minority view and contends that this piece of hearsay could have no relevancy upon the objective facts of the killing and that "the declaration of intention, so far as it may possibly be held to relate to deceased, had no element of spontaneity and was under grave suspicion of having been manufactured for the occasion." The determination of the majority, without argument in support of it, is especially unsatisfactory because a previous contrary decision by the same court is expressly overruled.

The decided weight of authority elsewhere is in favor of the broad view taken in the dissenting opinion.[1a] In his treatise on Evi-

[1](Ala. 1914) 66 So. 67.

[1a]The writer has not overlooked a line of cases of which Hunter *v.* State (1878) 40 N. J. L. 495, and State *v.* Pearce (1912) 87 Kan. 457, 30 Am. & Eng. Ann. Cas. 358, note, are examples, holding that statements of a deceased or an accused before starting on a journey are admissible as part of the *res gestae.* These decisions, if they are sound, would cover the special kind of self-serving declaration involved in Davis *v.* State (Ala. 1914) 66 So. 67, and would uphold the ruling of the majority. The point is not discussed in the dissenting opinion or mentioned in stating the grounds of the ruling of the majority, and therefore does not seem to have any influence upon the decision. Moreover, it is submitted that the

dence,[2] Mr. Chamberlayne contents himself with a mere statement of the general rule that evidence of a party's extra-judicial utterances is not competent in his favor unless they are part of the *res gestae*. Among the many illustrations given by him is *Hughes* v. *State,* in the Texas Court of Criminal Appeals,[3] involving the same point as *Davis* v. *State,* but holding that self-serving declarations or letters by an accused are never admissible when not part of the *res gestae*.

Although they do not say so, it is not improbable that the position taken by Professor Wigmore influenced the action of the majority of the Alabama court. The suggestion is one of many radical innovations proposed in that learned author's monumental treatise. He says:[4]

"Statements before the act, asserting *malice* or *hatred,* are always received *against* an accused; except so far as the time of feeling is so remote as to make it irrelevant (*ante,* § 395). Is there any reason why prior statements *in favor* of the accused—for example, of *good feeling* towards the injured party, or of *fear* of him as an aggressor—should not be equally admissible? Conduct offered as circumstantially evidential does not seem to be objected to. But statements asserting directly the existence of such feelings are by some Courts treated as inadmissible, so far as they do not accompany the very act charged.

"It is argued that the party must not be allowed to 'make evidence for himself.' But this objection applies equally to many classes of statements under the present Exception, and is yet not thought of as fatal. Moreover, the notion of 'making', that is, 'manufacturing' evidence, assumes that the statements are false, which is to beg the whole question. Then it is further suggested that at any rate the accused, if guilty, *may* have falsely uttered these sentiments in order to furnish in advance evidence to exon-

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cases referred to make a loose, unscientific use of the *res gestae* doctrine which more thoughtful text-writers and judges have now abandoned.

A declaration whither a man intends to go and what he intends to do has no necessary element of spontaneity. It may, of course, be sincere and, equally, it may be premeditated in order to manufacture evidence. Although disapproving Professor Wigmore's view that a defendant's declarations to disclose the state of his feelings should be received in his favor, one may concur in this author's opinion as to all statements to show subjective condition, that "it would be well if the invocation of the *res gestae* doctrine in this connection could be wholly abandoned. The simple and sufficient reason for admission is the hearsay Exception receiving statements of an existing mental condition. Whether these accompany some conduct relevant in the litigation, any movement or 'act,' is wholly immaterial." 3 Wigmore, Evidence, §1726 (2).

[2] 4 Chamberlayne, Evidence, § 2734.

[3] (Tex. 1912) 149 S. W. 173.

[4] 3 Wigmore, Evidence, § 1732 (2).

erate him from a contemplated crime. But here the singular fallacy is committed of taking the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty; in other words, the fundamental idea of the presumption of innocence is repudiated. We elaborate this presumption in painful and quibbling detail; we expend upon it pages of judicial rhetoric; we further maintain, with sentimental excess, the privilege against self-crimination; in short, we exhaust the resources of reasoning and strain the principles of common sense to protect an accused person against an assumption of guilt until the proof is irresistible; and yet, at the present point, we throw these fixed principles to the winds and make this presumption of guilt in the most violent form. Because (we say) this accused person *might* be guilty and therefore *might* have contrived these false utterances, therefore we shall exclude them, although without this assumption they indicate feelings wholly inconsistent with guilt, and, although, if he is innocent, their exclusion is a cruel deprivation of a most natural and effective sort of evidence."

The author cites in a note "cases on both sides," but in fact all of his considerable list of authorities, except three, held that the evidence should be excluded. In one of the latter admissibility was made to depend upon the statement being part of the *res gestae*; the other two cases treating the evidence as competent were in the Texas Court of Criminal Appeals. One of them had the special feature that part of defendant's declarations were applications to public officers for protection against the deceased. If the sole remaining decision does tend to countenance Professor Wigmore's new departure, it may be said that later utterances of the same court are fully in line with authority elsewhere, to wit: *Hughes* v. *State*,[5] the case cited by Mr. Chamberlayne, and *Brown* v. *State*.[6]

As for Professor Wigmore's argument, may it not be said that it would be really begging the question to indulge the presumption of innocence so far as to render admissible a party's own extra-judicial utterances to establish his innocence? Most enlightened people will agree that the privilege against self-crimination is maintained with "sentimental excess." But two wrongs do not make a right, and the fact that the failure of a criminal defendant to take the stand may not be commented upon would not justify a method of defense which may be paraphrased in terms of a popular jest: "How do you prove your innocence? I don't prove it; I acknowledge it."

To be sure, the defendant, in order to obtain an acquittal, is

[5] (Tex. 1912) 149 S. W. 173.
[6] (Tex. 1914) 169 S. W. 437.

not obliged actually to prove his innocence; the prosecutor is bound to prove guilt and to the defendant will accrue the benefit of failure of affirmative proof beyond a reasonable doubt. But in offering his own declarations the defendant proceeds not strictly on the defensive, but affirmatively. He adduces positive evidence to show that it was impossible or improbable that he had acted with malice or premeditation. A defendant is entitled to the general presumption of innocence, but it would be fallacious in order to confirm that presumption, or reestablish it if attacked, to admit evidence which necessarily assumes that the presumption is true. In other words, presuming a person to be innocent as a basis for admitting his own declarations negativing guilt, in a proceeding whose only purpose is to establish his guilt, would be substantial *petitio principii.*

In addition, one may ask why, if evidence of this sort ought to be admissible, a treatise on the law of evidence should be written to fill four bulky volumes. They order this matter differently in France and probably arrive at substantial justice in a large majority of cases. There is much to be said in favor of entirely doing away with a "law of evidence," and making judicial discretion the only criterion of admissibility. But if any kind of evidence is to be excluded it would seem that an interested party's extra-judicial declarations in his own favor should fall under the ban. The ruling of the majority in the Alabama case opens the door to unlimited manufacture of evidence having the appearance of exoneration by persons deliberately preparing to commit crime.

II.

Declarations by Third Persons.

(1) Mr. Chamberlayne states[7] that "it is well settled that the inculpating statements of third persons, alleging their commission of the offense which is the subject of the pending inquiry cannot be proved by the accused in his own favor as the extra-judicial admission of such a declarant." The most recent application of this rule by a court of last resort was in *Tillman* v. *State,* by the Supreme Court of Arkansas.[8] It was held that evidence that a murdered girl's father stated, shortly before her body was found in a well with a bullet hole in her forehead, that when the girl was found she would be south of a certain road with a bullet

[7] 2 Chamberlayne, Evidence, § 1313.

[8] (Ark. 1914) 166 S. W. 582.

hole in her forehead and a rock tied around her neck and in a well, was not admissible in evidence as tending to show that the father, and not the defendant, committed the crime.

The propriety of the rule is quite obvious. This species of testimony would be subject to the objection against all hearsay, that is, uncertainty as to what the alleged declarant actually said or intended to convey. Moreover, to make alleged confessions of third persons competent would render it easy and safe for a confederate to aid in the acquittal of a guilty person. The "confession" would be apt to exert some, perhaps a decisive, effect on the jury. After a defendant has been once acquitted, he is, except in a very few jurisdictions, immune from further prosecution, notwithstanding the subsequent discovery of new and convincing evidence. The "confessor" if he actually were innocent would probably have little difficulty in avoiding even an indictment for the crime itself, and as his declarations were extra-judicial he would not be amenable to prosecution for perjury.

(2) While there will doubtless be little dispute as to the correctness of the proposition last quoted from Mr. Chamberlayne, there has been serious controversy over the concluding language of the paragraph in which it occurs:[9] "That the third person alleged the commission of the crime with which accused is charged as part of a death-bed confession, is . . . immaterial." The preponderance of American authority sustains this view, but it was brought in question in a recent conspicuous case.

In *Donnelly* v. *United States*[10] it was held that the extra-judicial confession of a third person, since deceased, that he had committed the murder with which the defendant was charged, was not admissible in the defendant's behalf. The most important point made in the dissenting opinion by Mr. Justice Holmes (with whom Mr. Justice Lurton and Mr. Justice Hughes concurred), is as follows:

"The exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man (*Mattox* v. *United States,* 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. Rep. 50), and when we surround the accused

[9] 2 Chamberlayne, Evidence, § 1313.

[10] (1913) 228 U. S. 243.

with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length (2 Wigmore, Ev. secs. 1476, 1477)."

As to the suggestion that a declaration of this kind is against interest, I have already shown that an *extra-judicial* confession of a crime by the kind of a man who would be apt to make it but who is really innocent of the particular offense, would not be in any serious sense against his interest, even if he expected to continue living. It is difficult to see how such a confession can be in any sense against the interest of a dying man. The argument from analogy with the "dying declarations" exception to the hearsay rule is of much apparent force and ought to prevail if the exception itself were legitimately founded. But the answer to this contention again is that two wrongs cannot make a right. Professor Wigmore not only advocates the admissibility of extra-judicial confessions of third persons, but, almost alone among modern judges and text-writers, maintains that the "dying declarations" exception should be liberally administered in criminal cases and even extended so as to apply in civil actions. We say *almost* alone, because the Supreme Court of Kansas in its recent decision in *Thurston* v. *Fritz*[11] adopted the learned Professor's view and held dying declarations to be admissible in a civil case. Mr. Chamberlayne, on the other hand, speaks of the "dying declarations" exception as a "discredited rule," and it is submitted that the decision of the Supreme Court of Kansas in *Thurston* v. *Fritz* should be regarded as a piece of judicial eccentricity.[12] The trend of other recent decisions has been stringently to circumscribe the admissibility of dying declarations even in criminal cases.[13]

The former sanction for the admissibility of dying declarations on religious grounds has lost so much of its force that it is unsafe generally to recognize it. A writer in the Harvard Law Review for April, 1911,[14] aptly remarked: "It is entirely logical for one to say 'I am about to die; therefore why tell the truth?'" In an article in the American Law Review for September-October,

[11](Kan. 1914) 138 Pac. 625.

[12]See 27 Harvard Law Rev. 739; *cf.* 14 Columbia Law Rev. 520.

[13]See, for example, People *v.* Sazano (1914) 212 N. Y. 231; State *v.* Valencia (N. M. 1914) 140 Pac. 1119.

[14]24 Harvard Law Rev. 485.

1907,[15] on "Dying Declarations," the present writer has given at length his reasons for the opinion that the competency of dying declarations should be abrogated entirely. Similarly, it is believed that under present conditions the average criminal, although realizing that he was about to die, if he elected to speak at all, would not hesitate falsely to accuse an enemy, or to take upon himself the responsibility for a crime of which he was innocent, in order to exonerate a friend. It is submitted that the weight of argument, as well as authority, is against receiving dying confessions of third persons in exoneration of a defendant, and that State courts in which the question is *res nova* may well follow the ruling of the majority of the Supreme Court of the United States in *Donnelly* v. *United States, supra.*

III.

Declarations by Alleged Victim.

(1) Exculpatory declarations by the alleged victim of a defendant should be admitted whenever they legitimately bear upon the question of defendant's guilt. For example, it was held in *Commonwealth* v. *Trefethen*[16] that where defendant was on trial for causing the death of a young woman by drowning, evidence that she had made a statement to a trance medium, whom she consulted the day before her disappearance from her home, that she intended to drown herself, should have been received. A verdict against the defendant was, indeed, set aside principally because of the exclusion of such evidence. The soundness of this decision seems so patent that it is not necessary to give arguments in its favor at much length. The "state of mind" of the deceased within a reasonable time before her death is of great importance if the defense of suicide is urged with any plausibility. It is scarcely supposable that a person would declare that she intended to commit suicide in order to exculpate another person whom she suspected of intending to murder her. It is believed that the weight of authority and certainly the better reasoned cases support the doctrine of *Commonwealth* v. *Trefethen.*

The Supreme Court of Missouri in *State* v. *Fitzgerald*[17] held to the contrary in a long opinion which, however, as far as the present point is concerned, consisted merely of a marshalling of

[15] 41 American Law Rev. 660.

[16] (1892) 157 Mass. 180.

[17] (1895) 130 Mo. 407.

previous authorities without independent reasoning. The evidence was held incompetent on the conventional ground that it was hearsay and that the declarations were not dying declarations and did not constitute part of the *res gestae*. The reasons for making an exception to the hearsay rule in favor of suicidal declarations are fully as strong as the grounds for admitting complaints by the prosecutrix in prosecutions for rape. In *State* v. *Kelly*, in the Supreme Court of Errors of Connecticut,[18] it was held in a well considered opinion that where the defendant accused of poisoning his wife claimed that she had committed suicide, evidence of her declarations of the purpose to take her own life made within two months before her death was admissible, but that evidence of similar declarations made by the deceased from eleven months to three or four years before the time was inadmissible because too remote. It is, of course, proper that a reasonable time limit should be drawn in the exercise of discretion; and upon this point, as well as upon the general merits of this exception to the hearsay rule, the opinion of the Connecticut court is illuminative and convincing.

(2) The admissibility of exculpatory declarations by a victim has been discussed in a series of prosecutions for alleged uxoricide. As already intimated, the evidence should be considered competent whenever the subjective condition of the decedent logically bears upon the defendant's guilt. At least one court, however, has essayed to extend the scope of exculpatory declarations upon the theory of the existence of a corporate, conjugal state of mind which renders a statement by either spouse admissible when the motives of the other spouse are in question.

The case of *State* v. *Leabo*, in the Supreme Court of Missouri,[19] singularly enough has proved a lasting bone of contention for text-writers as well as courts. The actual decision is expressed as follows in the syllabus:

"On the trial of a husband for the murder of his wife, where the State introduces evidence consisting exclusively of the conduct and expressions of the wife to show that the relations between them were unpleasant, and to show motive for the crime, to meet it, letters of the wife to an intimate friend, written five, four, and three months before her death, in which she expresses an affectionate regard for her husband, are admissible, and their exclusion is erroneous."

[18] (1904) 77 Conn. 266, 58 Atl. 705.
[19] (1884) 84 Mo. 168.

Conceding that the State had the right to introduce the evidence it did, the propriety of permitting the defendant to meet it as he did seems beyond dispute. The compass of the decision as authority is in truth very limited. All that was abstractly determined is embraced in the single sentence of the opinion, that "if the State may introduce evidence of her [the wife's] declarations and conduct, inculpatory of her husband, it is equally his right to have the benefit of her declarations and conduct to meet such evidence." In *Pettit* v. *State*,[20] however, the Supreme Court of Indiana, citing and relying upon *State* v. *Leabo*, held that on the prosecution of a husband for uxoricide where the State relied for motive on loss of affection for the wife and infatuation for another woman, an affectionate letter written by the wife to the husband was competent in his favor. The ruling on this point as stated in the headnote is that "when the issues of a case involve the relations existing between husband and wife, communications between them are admissible in evidence as an index to such relations." There is no difficulty in subscribing to this proposition if the element of actual, and not merely assumed, mutuality be included. Letters constituting reciprocal correspondence between husband and wife, and their actions toward, and expressions to, one another, ought to be provable as tending to show affection or estrangement, thus bearing upon the question of motive. Moreover, in cases where a defendant's communications to his wife are admitted against him, it would be only proper to admit communications by her in reply to them, although the wife's letters, or the correspondence as a whole would have an exculpatory tendency. The Indiana court, however, resorted to the fiction of a community subjective state, saying in part:

"The relations existing between the deceased and her husband were naturally, and by the theory of the State's evidence, necessarily the foundation upon which the guilt of the defendant was to be determined. While indifference, or even ill treatment by the husband, does not necessarily destroy all the affection of the wife for him, yet the degree of that affection must, to a greater or less extent, depend upon his treatment of her. The relation of husband and wife is peculiar, in that all of the interests of life concern them alike, and are so inseparable from their thoughts of, and affections for, each other, that it can not be said, as a matter of law, that the estrangement of the husband necessarily destroys the affection of the wife for him. It necessarily follows that the existence of affection for him does not, of itself, preclude the loss of

[20](1893) 135 Ind. 393.

affection by him. Where the relation is the subject of inquiry, and where it becomes proper to investigate the treatment of one towards the other, with a view of determining that relation, it is proper to canvass the treatment of the other towards that one. The treatment by each of the other casts a light into the otherwise dark recesses of the heart of each. The strength of that light is a subject for the jury, and may not be determined as a question of law."

As already stated, the Indiana court relied upon *State* v. *Leabo* as its authority for this extreme and artificial assumption. In the following year, the Supreme Court of Missouri, in *State* v. *Punshon*,[21] held that while on a trial for wife murder it was competent for a defendant to show that the domestic relations had been of an affectionate character, statements of the wife made before the homicide were incompetent for this purpose as they were mere hearsay. The Missouri court expressly overruled *State* v. *Leabo* which was unnecessary for the later decision and improper from any point of view, because the Leabo case rested on special circumstances and, within its limited scope, was correct. It is not improbable that the reason for the pointed overruling was the fact that the Indiana court had followed the Leabo case in *Pettit* v. *State*, and the Missouri court, as then constituted, wished radically to repudiate the whole doctrine.

The question has been very recently elaborately discussed, with analysis of the authorities, by the Court of Criminal Appeals of Texas in *Brown* v. *State*,[22]—another prosecution for uxoricide. It was held that declarations by the deceased to third persons that she loved her husband, the defendant, were inadmissible because having no bearing upon the defendant's attitude toward her. The court remarked:

"Appellant, in our opinion, makes the mistake of thinking it material in this case to prove the state of feeling of the deceased. In this character of case where one was murdered by some one while she slept, her state of feelings would not be a material inquiry. Deceased was not being tried, but it was appellant, and it was his act, conduct and state of feeling that was an issue in the case, and if deceased did love him, this would not tend to prove that he loved her."

This latest decision is unanimous save for one member of the court and it is believed that the position of the majority is correct. Mere statements by the alleged victim to outsiders or an isolated

[21] (1894) 124 Mo. 448.
[22] (Tex. 1914) 169 S. W. 437.

letter by her to her husband should be excluded. The vice of the Indiana doctrine is that, under an artificial assumption that what one spouse has said must tend to show what the other spouse feels, there are introduced in evidence declarations not probative as to the real issues but apt to introduce a disturbing element of emotion.

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